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Nos. 95-1425, 95-1460

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LUCIOUS ABRAMS, *et al.*,
Appellants,
v.
DAVIDA JOHNSON, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,
v.
DAVIDA JOHNSON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Georgia

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BRIEF AMICUS CURIAE OF THE GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE [1]

The Georgia Association of Black Elected Officials ("GABEO") is an organization of more than 700 African-Americans elected to public office in Georgia. Its members include three United States Representatives and more than 40 state legislators, as well as hundreds of county and municipal officials. *Amicus* GABEO and its mem-

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[1] The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court.

bers have a direct interest in the legal standards that will govern federal district courts in the remedial phase of cases under *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*), *Miller v. Johnson*, 115 S. Ct. 2475 (1995), and their progeny. If remedial courts are allowed to exercise unfettered discretion, *amicus* fears that the power to draw congressional and legislative districts will shift dramatically away from the States, and partisan and factional interests of every stripe will seek to attain in federal court the political victories they were unable to win in their state legislatures or at the polls.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a long line of cases culminating in *White v. Weiser*, 412 U.S. 783 (1973), and *Upham v. Seamon*, 456 U.S. 37 (1982), this Court has established principles and procedures to constrain the discretion of federal courts at the remedial phase of redistricting litigation. The *Upham-Weiser* procedure gives the state legislature broad latitude to cure a judicially established violation. But if the State fails to produce a legal redistricting plan, the federal court, in fashioning a remedy, must begin with the State's *invalid* plan and may alter *only* those aspects of it that the court has specifically found to be unconstitutional or illegal. All other aspects of the State's plan must be left untouched, as they are presumed to reflect the legitimate policy choices of the State and its citizens. *See Upham*, 456 U.S. at 40-44 (*per curiam*); *Weiser*, 412 U.S. at 793-97.

The court below carved out an unprecedented and unwarranted exception to the *Upham-Weiser* standard. 922 F. Supp. 1556, 1559-61 (S.D. Ga. 1995). The three-judge District Court had declared unconstitutional the Second and Eleventh Districts in Georgia's 1992 congressional plan, 922 F. Supp. 1552, 1553-56 (S.D. Ga. 1995); 864 F. Supp. 1354, 1359, 1393 (S.D. Ga. 1994), and initially had indicated that, if the legislature

failed to remedy the violations, the court would adopt a plan "as narrowly conceived as possible to satisfy constitutional requirements and [to] cause minimal disruptions to the political processes of the State of Georgia." Order, Aug. 2, 1995; *accord* 864 F. Supp. at 1393. However, when the legislature failed to enact a substitute plan, the District Court (with one judge dissenting) reversed course and held that the State's 1992 plan could *not* form the basis for a proper remedy because it "more closely reflect[ed]" the intentions of the United States Department of Justice than those of the Georgia General Assembly. 922 F. Supp. at 1560; *see id.* at 1560-61, 1563; *see also id.* at 1563 & n.9 (also refusing to base its remedy on the State's *1991* plan, even though the General Assembly enacted that plan *before* the Justice Department had begun its review).

Having freed itself from the constraints that *Upham* and *Weiser* normally impose on a federal remedial court, the two-judge majority proceeded to redraw all eleven of Georgia's congressional districts, to pit two pairs of incumbents against each other (thus creating two open seats), and to move a fifth incumbent to a new district. In doing so, the District Court ran roughshod over the specific criteria the General Assembly had enunciated in its 1991 redistricting guidelines and had embodied in its 1991 and 1992 congressional maps. 922 F. Supp. at 1559-70 (remedial order and opinion); J.S. App. 41a-43a (court-imposed plan);[2] *see also Miller*, 115 S. Ct. at 2483 (citing the General Assembly's express criteria, including "preserving the core[s] of existing districts" and "avoiding contests between incumbents"). Even the District Court conceded that the changes it had imposed upon the 1992 map were "drastic." 922 F. Supp. at 1561.

The District Court's approach to its remedial task makes clear that the court misapprehended a key analyti-

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[2] All references to J.S. (or J.S. App.) are to the jurisdictional statement in No. 95-1460 (or the appendix thereto).

cal distinction between vote-dilution and *Shaw* claims. A vote-dilution claim seeks to correct an imbalance in political and electoral opportunity. A remedy that fully cures that imbalance and offers all voters an equal opportunity to elect their preferred candidates may well alter the results of the next election. By contrast, a *Shaw* claim focuses upon an entirely different problem—the deliberate classification and separation of voters on the basis of race. Such racial classifications cause constitutional harm not because they dilute anyone's voting strength, but rather because "they convey the message that political identity is, or should be, predominantly racial." *Bush v. Vera*, 64 U.S.L.W. 4452, 4461 (U.S. June 13, 1996) (plurality opinion); *see also id.* at 4462 (*Shaw* violations cause "expressive harms"). A remedy that fully cures a *Shaw* violation, therefore, need not have *any* effect on electoral outcomes. Indeed, a *Shaw* remedy should not affect outcomes unless doing so is necessary to cure the violation; outcomes under an invalidated plan are presumptively consistent with state policy objectives, and must therefore be respected to the maximum extent possible. Thus, a federal remedial court in a *Shaw* case abuses its equitable discretion if it goes out of its way to redistribute political power by dramatically enhancing the voting strength of some groups at the expense of others, forcing certain incumbents to run against each other, and effectively "picking winners and losers." The court below committed precisely that error.

If the District Court's sweeping remedial order is affirmed, the *Upham-Weiser* constraints on federal remedial courts will be rendered largely meaningless in *Shaw* cases. Wherever the Justice Department, acting pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, is said to have "tainted" or "subvert[ed]" the districting process, 922 F. Supp. at 1560, 1563, federal remedial courts will be free to shunt aside legitimate state policy decisions and to redraw districts any way they see fit. Thus, *Shaw* litigation will give rise to a new and extraordi-

narily lenient remedial standard which will invite partisan and factional interests of all stripes to seek from the federal courts those political victories that they were unable to win in the halls of their state legislatures or at the polls. This enlargement of the federal judicial role transgresses fundamental principles, and should not stand.

By clarifying (and constraining) the scope of federal district courts' remedial authority, this Court can prevent *Shaw* litigation from degenerating into factional free-for-alls and thereby usurping the political role reserved to the States under our constitutional order. At the same time, clear guidance from this Court can foster a return to the sound redistricting principles and practices that prevailed before 1990.

ARGUMENT

This Court has repeatedly stated that *Shaw* claims are "analytically distinct" from vote-dilution claims, *Shaw I*, 509 U.S. at 652; *Miller*, 115 S. Ct. at 2485, but has had no occasion to explain how that distinction should affect a federal district court's remedial actions in a *Shaw* case. In recent months, three-judge courts in Georgia, Louisiana, Florida, and Texas have—in different ways—turned their backs on the remedial procedure established by this Court in *Upham* and *Weiser*.[3] Now that eight

[3] In *Hays v. Louisiana*, Nos. 92-1522, 95-1241, slip op. at 1-2, 24-27 (W.D. La. Jan. 5, 1996) (*per curiam*), *appeals dismissed as moot*, 64 U.S.L.W. 3848 (U.S. June 24, 1996), the three-judge District Court expressly *refused* to give the state legislature any opportunity to redraw its districting plan. In *Johnson v. Mortham*, No. TCA 94-40025-MMP, 1996 WL 297280, at *1 (N.D. Fla. May 31, 1996), although the three-judge District Court ordered a legislatively enacted remedial plan into effect, it refused to hold that the plan was constitutionally valid and expressly stated that challenges to the plan's constitutionality could "be brought in a separate lawsuit." In *Vera v. Bush*, C.A. No. H-94-0277 (S.D. Tex. July 11, 1996), the three-judge District Court, ruling from the bench, gave the parties only six days to settle the case and indicated a willingness to impose a court-drawn plan even though the Texas Legisla-

congressional districts in five States (Florida, Georgia, Louisiana, North Carolina, and Texas) have been invalidated under *Shaw* principles,[4] remedial issues are coming to the fore. This case provides the Court with a timely opportunity to reaffirm *Upham* and *Weiser* and to explain how they should be applied in *Shaw* cases.

I. UNDER *UPHAM* AND *WEISER*, FEDERAL COURTS REMEDYING UNCONSTITUTIONAL DISTRICTING PLANS MUST DEFER TO THE STATE, AND MAY DO *ONLY* WHAT IS NECESSARY TO REDRESS THE PARTICULAR INJURIES CAUSED BY THE CONSTITUTIONAL VIOLATION.

"Principles of federalism and separation of powers impose stringent limitations on the equitable power of federal courts." *Lewis v. Casey*, 64 U.S.L.W. 4587, 4599 (U.S. June 24, 1996) (Thomas, J., concurring). "The power of the federal courts to restructure the operation of local and state governmental entities is not plenary. It may be exercised only on the basis of a constitutional violation." *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419-20 (1977); *see Freeman v. Pitts*, 503 U.S. 467, 489 (1992); *Rizzo v. Goode*, 423 U.S. 362, 377 (1976); *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) (*Milliken I*); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

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ture has been out of session and has had no opportunity to remedy the violations since this Court handed down its decision in *Bush v. Vera*, *supra*, on June 13. *See* Alan Bernstein, *Judges Warn They May Draw District Lines*, Houston Chron., July 12, 1996, at 1A.

[4] *See Bush*, 64 U.S.L.W. at 4454 (Texas Districts 18, 29, and 30); *Shaw v. Hunt*, 64 U.S.L.W. 4437, 4438 (U.S. June 13, 1996) (*Shaw II*) (North Carolina District 12); *Miller v. Johnson*, 115 S. Ct. at 2494 (Georgia District 11); *Johnson v. Miller*, 922 F. Supp. at 1553 (Georgia District 2); *Hays v. Louisiana*, *supra*, slip op. at 1, 24 (Louisiana District 4); *Johnson v. Mortham*, No. TCA 94-40025-MMP, 1996 WL 189235, at *27-*28 (N.D. Fla. Apr. 17, 1996, as modified June 6, 1996) (Florida District 3).

Once a discrete constitutional violation is found, a federal court is required to tailor the nature and scope of the remedy to fit the nature and extent of the violation. *See United States v. Virginia*, 64 U.S.L.W. 4638, 4647 (U.S. June 26, 1996); *Lewis*, 64 U.S.L.W. at 4590 (majority opinion); *Missouri v. Jenkins*, 115 S. Ct. 2038, 2049 (1995); *Brinkman*, 433 U.S. at 420; *Milliken v. Bradley*, 433 U.S. 267, 280-82 (1977) (*Milliken II*); *Milliken I*, 418 U.S. at 738, 744; *Swann*, 402 U.S. at 16. The remedial decree therefore must directly address and relate to " 'the *condition* alleged to offend the Constitution.' " *Shaw v. Hunt*, 64 U.S.L.W. 4437, 4442 (U.S. June 13, 1996) (*Shaw II*) (quoting *Jenkins*, 115 S. Ct. at 2049); *see Freeman*, 503 U.S. at 487; *Rogers v. Lodge*, 458 U.S. 613, 628 (1982); *Milliken II*, 433 U.S. at 280-82; *Milliken I*, 418 U.S. at 738; *Swann*, 402 U.S. at 16. This Court has steadfastly refused to give the lower "federal courts a blank check to impose unlimited remedies upon a constitutional violator." *Jenkins*, 115 S. Ct. at 2058 (O'Connor, J., concurring).

Furthermore, "the federal courts in revising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken II*, 433 U.S. at 280-81; *accord Jenkins*, 115 S. Ct. at 2049, 2054; *Freeman*, 503 U.S. at 489; *Spallone v. United States*, 493 U.S. 265, 276 (1990). "Judicial authority enters only when local authority defaults." *Swann*, 402 U.S. at 16. "[O]verreaching by a federal district court simply cannot be tolerated in our federal system." *Lewis*, 64 U.S.L.W. at 4593 (Thomas, J., concurring).

These general principles of judicial restraint, equity, and federalism apply with particular force when federal courts invalidate state redistricting plans. The Constitution allocates to the States the primary responsibility for reapportionment. U.S. Const., art. I, § 2, cl. 1; *id.* § 4,

cl. 1; *see Bush*, 64 U.S.L.W. at 4465 (O'Connor, J., concurring); *Growe v. Emison*, 507 U.S. 25, 34 (1993); *Reynolds v Sims*, 377 U.S. 533, 586 (1964).

In *Upham*, 456 U.S. at 40-44, and *Weiser*, 412 U.S. at 793-97, this Court established a standard procedure for the remedial stage of redistricting cases, to ensure that federal courts respect these fundamental principles. After a district court declares a plan invalid, its first step ordinarily is to give the State a reasonable opportunity to draw a substitute. *Weiser*, 412 U.S. at 794-95; *Reynolds*, 377 U.S. at 586.[5] As Justice Powell explained, a plan enacted by the legislature is "likely to reflect a State's political policy and the will of its people more accurately than a decision by unelected federal judges." *Connor v. Finch*, 431 U.S. 407, 431 (1977) (dissenting opinion) (citing *Chapman v. Meier*, 420 U.S. 1 (1975)).[6]

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[5] *See Voinovich v. Quilter*, 507 U.S. 146, 156 (1993); *Growe*, 507 U.S. at 34; *Upham*, 456 U.S. at 41-42; *McDaniel v. Sanchez*, 452 U.S. 130, 138, 150 n.30 (1981); *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (plurality opinion); *Sixty-seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 196 (1972) (*per curiam*); *Connor v. Williams*, 404 U.S. 549, 552 n.4 (1972); *Ely v. Klahr*, 403 U.S. 108, 114 & n.6 (1971); *Burns v. Richardson*, 384 U.S. 73, 84-85 (1966); *see also Bush*, 64 U.S.L.W. at 4460 (plurality opinion); *Miller*, 115 S. Ct. at 2488; *id.* at 2500 (Ginsburg, J., dissenting) (Both the majority and the dissenters "agree that federalism and the slim judicial competence to draw district lines weigh heavily against judicial intervention in apportionment decisions; as a rule, the task should remain within the domain of state legislatures.").

[6] In attempting to remedy its previous violation, the legislature has very broad discretion and is free to reconsider its goals and policies. *See Shaw II*, 64 U.S.L.W. at 4443 n.9 ("States retain broad discretion in drawing [remedial] districts . . . .") (citing *Voinovich*, 507 U.S. at 156-57; *Growe*, 507 U.S. at 32-37); *Bush*, 64 U.S.L.W. at 4460 (plurality opinion) ("States retain a flexibility that federal [remedial] courts . . . lack"); *cf. id.* at 4464 (O'Connor, J., concurring) ("fundamental concerns of federalism mandate that States be given some leeway"). For example, a legislature certainly could decide that it no longer wanted to pre-

If the State enacts no substitute plan, or if the plan it enacts is itself invalid, the court's second step is to request that the parties and *amici* submit proposed remedial plans. *See, e.g., Upham*, 456 U.S. at 38. The present case involves no dispute as to these first two steps.

The third step—which *is* at issue here—is for the court either to choose among the litigants' proposed plans or to draw its own remedial map (often with the help of a special master). But the district court's discretion at this third step is far more constrained than is the legislature's at the first step. *See Voinovich v. Quilter*, 507 U.S. 146, 156-57 (1993); *see also Bush*, 64 U.S.L.W. at 4487 (Souter, J., dissenting); *Connor v. Finch*, 431 U.S. at 415 ("[The task of] a federal court . . . left with the unwelcome obligation of performing in the legislature's stead, while lacking the [legislature's] political authoritativeness, . . . is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner 'free from any taint of arbitrariness or discrimination.'" (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)); *cf. Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in judgment) ("Federal courts [should not] attempt to recreate the complex process of legislative apportionment in the context of adversary litigation in order to reconcile the competing claims of political, religious, ethnic, racial, occupational, and socio-economic groups.").

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serve the cores of existing districts or to avoid contests between incumbents. *See Burns*, 384 U.S. at 83-85, 89 n.16. So long as the State enacts a new plan that remedies the violation and complies with the applicable federal and state constitutional and statutory provisions, it will become the governing law. *Wise*, 437 U.S. at 540 (plurality opinion); *Weiser*, 412 U.S. at 795; *Burns*, 384 U.S. at 85; *see also Voinovich*, 507 U.S. at 156 ("[T]he federal courts are bound to respect the State's apportionment choices unless those choices contravene federal requirements.").

A federal court "seeking to remedy an unconstitutional apportionment [must] right the constitutional wrong while minimizing disturbance of legitimate state policies." *Sixty-seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 202 (1972) (Stewart, J., dissenting). Federal courts "are never free to 'make' the policy choices underlying redistricting decisions, but must discover and faithfully apply the State's own choices. While the creation of state policy is political, its discovery and application presumably should not be." Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself*, 4 J.L. & Pol. 653, 664-65 (1988).

In essence, the remedial court must differentiate those aspects of the State's plan that are unconstitutional from those that reflect the State's legitimate political policies, and then eliminate the former while minimizing interference with the latter. *See Upham*, 456 U.S. at 43 ("An appropriate reconciliation of [the requirements of the Constitution with the goals of state political policy] can only be reached if the district court's modifications of a state plan are limited to those *necessary* to cure any constitutional or statutory defect." (emphasis added)); *Weiser*, 412 U.S. at 795 ("In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.' ") (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)).

In devising a narrowly tailored remedy—making *only* those changes "*necessary* to cure [the] . . . defect," *Upham*, 456 U.S. at 43 (emphasis added)—courts focus upon the concrete, particularized "injury-in-fact" caused by the invalid law. *See Lewis*, 64 U.S.L.W. at 4590 ("The remedy must . . . be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established."); *id.* at 4591 n.7 ("Courts have no power to presume and remediate harm that has not been established.").

In a vote-dilution case, voters who belong to a particular group claim to have been illegally disadvantaged by a districting plan. Their injury is, simply put, that the "wrong" representative was elected because the plan improperly enhanced the political strength of one identifiable group of voters, at the expense of the group to which the plaintiffs belong. *Cf. United States v. Saylor*, 322 U.S. 385, 386, 389 (1944) (right to vote protects against the diluting effect of ballot-box stuffing). For example, if voting is racially polarized and members of a sizable, predominantly black community have been fragmented and dispersed among several districts, the preferences and interests of whites will be systematically overrepresented, at the expense of blacks. *See Shaw II*, 64 U.S.L.W. at 4442 (citing *Johnson v. De Grandy*, 114 S. Ct. 2647, 2655 (1994)); *White v. Regester*, 412 U.S. 755, 765-70 (1973); *see also Bush*, 64 U.S.L.W. at 4482 n.3 (Souter, J., dissenting); *Voinovich*, 507 U.S. at 154-55 (minority vote-dilution claims focus "exclusively on the consequences" of redistricting and on "electoral outcomes"); *Growe*, 507 U.S. at 40-41 (unless minority vote-dilution plaintiffs can prove that their group (a) has the potential to elect its preferred representative in a new, remedial district, but (b) is unable to do so under the challenged districting plan, "there neither has been a wrong nor can be a remedy") (citing *Thornburg v. Gingles*, 478 U.S. 30, 50-51 & n.17 (1986)); *Gingles*, 478 U.S. at 93 (O'Connor, J., concurring in judgment) ("electoral success" is "the linchpin of vote dilution claims").

Any cure that adequately reflects different groups' undiluted voting strength—*e.g.*, uniting a fragmented black community within a single district—will likely alter the *outcome* of the next election. The federal court's remedy may result in the retirement or defeat of a particular incumbent and the election of a new candidate preferred by those minority voters whose political strength the previous plan diluted. Indeed, that is the very point of the

litigation: to change the composition of the relevant governing body by altering electoral results. As Point II *infra* explains, *Shaw* claims are entirely different, because they simply do not address electoral *outcomes*.

II. IN REMEDYING REDISTRICTING PLANS THAT UNCONSTITUTIONALLY CLASSIFY AND SEPARATE VOTERS ON THE BASIS OF RACE, A FEDERAL COURT MUST REDRAW LINES PREDOMINANTLY USING TRADITIONAL DISTRICTING CRITERIA AND MUST AVOID UNNECESSARILY REDISTRIBUTING POLITICAL POWER AND ALTERING LIKELY ELECTORAL OUTCOMES.

Shaw claims are not reverse discrimination claims. Here, for example, plaintiff-appellees do not argue that Georgia's 1992 plan minimized or diluted the voting strength of whites or of any other racial group. *See Shaw I*, 509 U.S. at 641; *see also De Grandy*, 114 S. Ct. at 2664 (O'Connor, J., concurring).

Rather, the claim here is that the State injured voters by using race as the predominant motivating factor in drawing district lines. *See Shaw II*, 64 U.S.L.W. at 4439 ("The constitutional wrong occurs when race becomes the 'dominant and controlling' consideration." (quoting *Miller*, 115 S. Ct. at 2486)); *id.* at 4440 (quoting *Miller*, 115 S. Ct. at 2488); *Bush*, 64 U.S.L.W. at 4454-55 (plurality opinion); *id.* at 4464 (O'Connor, J., concurring). Specifically, the District Court found that Georgia had intentionally drawn the boundaries of its Eleventh and Second Congressional Districts so that blacks fell on one side of the lines and whites on the other [7]—rather

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[7] *Cf. Bush*, 64 U.S.L.W. at 4458 n.* (plurality opinion) (focusing on "the difference [in racial composition] between areas just inside and just outside the district lines"); *id.* at 4455, 4459 (strictly scrutinizing district lines because they "separat[e] Hispanic voters from African-American voters on a block-by-block basis" and thereby "correlate almost perfectly" with computerized racial data).

than following pre-existing lines that define recognizable geographic or territorial units, such as counties, municipalities, townships, communities, media markets, neighborhoods, census tracts (or census block numbering areas),[8] local election precincts (or census voter tabulation districts), or natural (or man-made) geographic regions. 922 F. Supp. at 1553-56; *see Bush*, 64 U.S.L.W. at 4461 (plurality opinion) (criticizing districts because they "cut[] across pre-existing precinct lines and other natural or traditional divisions"); *see also* Bernard Grofman, Shaw v. Reno *and the Future of Voting Rights*, PS: Political Science & Politics, Mar. 1995, at 27, 30-31 (legislators should be able to explain to their constituents the boundaries of their districts in simple, commonsense terms, based on recognizable geographic referents).

The plaintiffs in a typical *Shaw* case allege that the State's race-based line-drawing—intentionally assigning black voters to one district and white voters to a separate district—creates an *implied* racial classification which (like an express racial classification) stigmatizes persons on the basis of their race and therefore is presumptively unconstitutional. *See Shaw I*, 509 U.S. at 642-49. Any harm proven in a *Shaw* case flows from this implied racial classification—not from the districting plan's effects on electoral outcomes. *See Bush*, 64 U.S.L.W. at 4461 (plurality opinion) ("[T]he ultimate constitutional values at stake involve the harms caused by the use of unjustified racial classifications . . . ."); *see also* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 Harv. L. Rev. 1175, 1184 n.35 (1996) ("[T]he harm 'is, quite literally, the drawing of lines based on race.'" (citation omitted)).

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[8] Census tracts are designed to encompass relatively socially homogeneous populations, and they are typically bounded by prominent natural or man-made geographical features (*e.g.*, rivers or highways). *Wilson v. Eu*, 1 Cal. 4th 707, 718 (1992).

The cure for a *Shaw* violation is to "fix" the unconstitutional district's boundary, so that it is not based on race in substantial disregard of traditional districting criteria, such as respect for the pre-existing borders of counties, municipalities, communities of interest, or other recognizable geographic units. *See Miller*, 115 S. Ct. at 2488; *id.* at 2497 (O'Connor, J., concurring), *quoted in Bush*, 64 U.S.L.W. at 4454 (plurality opinion). Such a narrowly tailored cure would remedy any harm caused by the racial classification embodied in an electoral district: once the remedy is implemented, voters' placement within or without a particular district would be explained by their residence in a particular county (or municipality or community) rather than by the State's unconstitutional use of race. *See United States v. Hays*, 115 S. Ct. 2431, 2433, 2436-37 (1995); *Shaw I*, 509 U.S. at 641-42, 657-58; *see also Shaw II*, 64 U.S.L.W. at 4439.[9]

The redistricting approach proposed here is essentially a return to the traditional techniques that prevailed prior to the 1990s round of redistricting. *See Bush*, 64 U.S.L.W. at 4462 (plurality opinion). In combination with aggressive application of Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973, 1973c, three technical factors distinguished post-1990 congressional redistricting. *See* Grofman, *supra*, at 27. First, fear of liability under

[9] Given the extremely strict "one person, one vote" requirement mandated by Article I, Section 2 of the Constitution, *see Karcher v. Daggett*, 462 U.S. 725, 730-44 (1983), it may be impossible for the *entire* boundary of each congressional district to follow pre-existing lines. *See Connor v. Finch*, 431 U.S. at 419; *id.* at 429 (Blackmun, J., concurring in judgment). But a district is presumptively unconstitutional if the State (or federal remedial court) relied on race *in substantial disregard* of traditional districting criteria when placing "a *significant number* of voters within or without [that] particular district." *Miller*, 115 S. Ct. at 2488 (emphasis added); *see id.* at 2497 (O'Connor, J., concurring) (reliance on race "in substantial disregard" of traditional districting criteria triggers strict scrutiny), *quoted in Bush*, 64 U.S.L.W. at 4454 (plurality opinion).

Article I, Section 2's strict "one person, one vote" requirement frequently drove redistricters to cross county, city, and other socially meaningful lines in the search for perfect population equality. *See, e.g., Bush*, 64 U.S.L.W. at 4470 n.10 (Stevens, J., dissenting) ("Every one of Texas' 30 congressional districts contains precisely 566,217 persons. Of course, this precision could not have been accomplished without breaking apart counties, cities, neighborhoods, and even pre-existing voting precincts."); *see also Connor v. Finch*, 431 U.S. at 429 (Blackmun, J., concurring in judgment) ("To the extent that the attainment of precisely equal districts requires abandonment of longstanding political boundaries, gerrymandering is that much easier.").

Second, the Bureau of the Census—for the first time—provided racial data on a block-by-block level. *See Bush*, 64 U.S.L.W. at 4455 (plurality opinion). Because African-Americans (and, to a lesser degree, Hispanics) overwhelmingly vote for Democratic candidates, *see, e.g., id.* at 4457 (citing "evidence that 97% of African-American voters in and around the city of Dallas vote Democrat"), the Census Bureau's "unprecedentedly detailed racial data" effectively enabled redistricters to seek partisan advantage on a block-by-block basis, even though actual election data were only available by precinct. *Id.* at 4455.

And third, the computer revolution made it easy to draw numerous alternative districting plans, also on a block-by-block basis, and to assess immediately each districts' racial composition and partisan balance of power (in part, by inferring partisan data from racial data). *See id.* at 4455.

The 1990s redistricters' extensive use of the census block—which, as the Census Bureau's smallest geographic unit, typically contains fewer than a hundred persons—as the foundational "building block" for congressional districts was critical. On average, a congressional district contains fewer than a dozen counties, 40 incorporated

municipalities, 140 census tracts (and block numbering areas), and three or four hundred local election precincts (or voter tabulation districts)—but fully *sixteen thousand* census blocks.[10] As the number of building blocks realistically available to redistricters increased, the number of technically feasible districting plans—and hence the potential for political or racial manipulation—rose exponentially. Moreover, the extensive use of census blocks to define congressional district perimeters enabled redistricters to weave in and out, assigning individual blocks to particular districts on the basis of their racial composition.

The new technologies and data of the 1990s are here to stay, but their misuse can easily be prevented. So long as a district is built primarily from geographic units such as whole, undivided precincts, census tracts, municipalities, and counties, district boundaries will make sense to voters and candidates alike, and citizens cannot credibly claim they have been personally subjected to any governmental race-based classification. Indeed, precisely this approach was used in drawing the California congressional districts that withstood a *Shaw* challenge in *DeWitt v. Wilson*, 856 F. Supp. 1409, 1411, 1413-15 (E.D. Cal. 1994) (three-judge court) (upholding districts built entirely with undivided census tracts), *summarily aff'd in relevant part*, 115 S. Ct. 2637 (1995), *cited with approval in Bush*, 64 U.S.L.W. at 4454 (plurality opinion).

This approach should generally be followed when federal courts attempt to redraw an unconstitutional majority-minority district. That redrawing process will usually affect both the district's shape and its demographics (but not, of course, its total population). As for shape, the district will become less bizarre and more compact, as its perimeter is straightened out and thereby shortened (at least in relation to the district's total area). *See* Richard

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[10] *See* U.S. Dep't of Commerce, Bureau of the Census, *Number of Geographic Entities of the United States* (Aug. 4, 1994).

H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, 505 & n.203, 565 table 3, 571-73 table 6 (1993) (defining compactness in terms of the ratio of a district's area to the square of its perimeter), *cited in Bush*, 64 U.S.L.W. at 4455, 4458 (plurality opinion); *see, e.g., Johnson v. Mortham*, 1996 WL 297280, at *1 (ordering into effect a remedial district with a slightly larger geographic area, but a 55% shorter perimeter, than the invalid district it replaced).

As for demographics, a proper remedy usually will reduce the district's minority population and increase its white population. Often, the district will be transformed into a "majority-white" district, albeit one with a sizable minority population. *See, e.g., id.* (transforming a 55.0% African-American district into a 46.5% African-American district). Sometimes, the reduction in the minority group's percentage of the electorate will be so great that the minority-preferred incumbent will retain no realistic potential for reelection. Where such a result is unavoidable, the court may have no choice.

But in many other cases, such as this one, the district court will be faced with two or more proposed remedies (either submitted by the litigants, or drawn by the court or its special master), each of which draws district lines without excessively relying on race and largely adheres to the State's traditional districting criteria. Faced with such a choice, the court must minimize its intrusion into the State's political processes by rejecting the plans that would be most disruptive to electoral outcomes. In the *Shaw* context, unlike the vote-dilution context, the harm has nothing to do with electoral results, and therefore any *unnecessary* interference with those results would constitute a clear abuse of the federal court's equitable discretion. Thus, a properly fashioned *Shaw* remedy typically will alter a district's shape and demographics, but not its politics.

III. THE GEORGIA DISTRICT COURT ABUSED ITS DISCRETION BY UNNECESSARILY INJECTING ITSELF INTO THE STATE'S POLITICAL PROCESSES, OVERTURNING THE STATE'S SPECIFIC DISTRICTING POLICIES, AND SELECTING A PLAN THAT WAS LIKELY TO WREAK HAVOC ON GEORGIA'S CONGRESSIONAL DELEGATION, WHEN IT COULD HAVE CURED THE VIOLATION WHILE RESPECTING STATE POLITICAL POLICIES AND MINIMALLY AFFECTING LIKELY ELECTORAL OUTCOMES.

The District Court improperly revisited—and rejected—legitimate and longstanding redistricting policies of the State of Georgia. As a threshold matter, the District Court committed a serious error in concluding that it was free to ignore the state policy choices reflected in Georgia's legislatively enacted 1992 redistricting plan. That the specific contours of that plan may have been influenced by Department of Justice Section 5 objections is no reason to find the plan an inauthentic expression of state policy generally. Quite apart from the legislature's putative desire to create three majority-minority districts, the invalidated plan reflected other longstanding state policies. Some of those policies—for example, avoiding contests between incumbents and preserving the cores of existing districts—had been expressly endorsed by the Georgia General Assembly in its 1991 redistricting guidelines and had been consistently applied not only in the 1991 and 1992 districting maps, but in a series of congressional plans dating back more than half a century. Nothing about this Court's decision invalidating the 1992 plan renders those race-neutral policies less worthy of respect at the remedial stage. By rejecting them, the federal court usurped the General Assembly's role and vastly exceeded the scope of its own authority.

The evidence of the District Court's overreaching is powerful. The court expressly rejected several proper remedial plans submitted by defendant-intervenors and

their *amici*, and instead reached out to create a new map, from scratch, that largely ignored the State's traditional districting criteria and could unnecessarily wreak havoc on the composition of Georgia's congressional delegation.

A. Illustrative Plan "GA-PLAN-A" Is Constitutional.

One of the remedial plans before the District Court was "GA-PLAN-A," the "Illustrative Plan" submitted by defendant-intervenor the United States. J.S. App. 44a (map). GA-PLAN-A's congressional districts are contiguous, geometrically and functionally compact, and respectful of political subdivisions and of communities defined by actual shared interests, including those "communities that have a particular racial makeup." *Miller*, 115 S. Ct. at 2488, 2490. The court conceded that GA-PLAN-A contains a lower overall population deviation (0.19%) than the court-imposed plan (0.35%). 922 F. Supp. at 1561;[11] *see Weiser*, 412 U.S. at 786-88, 796-97 (reversing a district court order that had rejected the proposed remedial plan with the lowest population deviation); *Daggett v. Kimmelman*, 580 F. Supp. 1259, 1264-65 (D.N.J.) (three-judge court) (adopting the proposed remedial plan with the lowest population deviation, even though it split two municipalities), *summarily aff'd sub nom. Karcher v. Daggett*, 467 U.S. 1222 (1984).

But the court rejected GA-PLAN-A and called it "constitutionally defective" *solely* on the ground that it "split *numerous* counties outside of the metropolitan Atlanta area, apparently for racial reasons." 922 F. Supp. at 1561 & n.4 (emphasis added). The District Court misunderstood both the law and the facts. As explained *supra*, Article I, Section 2's strict population-equality requirement effectively mandates the splitting of some counties. *See Connor v. Finch*, 431 U.S. at 419 ("The

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[11] Five of the districts in the court-imposed plan—but *none* in GA-PLAN-A—deviate more than 0.10% from the ideal district population. *Compare* J.S. App. 43a *with id.* at 45a.

policy of maintaining the inviolability of county lines . . ., if strictly adhered to, must inevitably collide with the basic equal protection standard of one person, one vote.").

And, as to the facts, the District Court's characterization of GA-PLAN-A is plainly incorrect. GA-PLAN-A splits only *two* of the 139 counties outside the metropolitan Atlanta area, *see* J.S. App. 44a, and primarily for equal-population and other non-race-based reasons. The divided counties—Bibb and Muscogee—are two of the four most heavily and densely populated Georgia counties outside the metropolitan Atlanta area. *Cf. Bush*, 64 U.S.L.W. at 4455-56 (plurality opinion) (noting that "large, densely populated urban counties" are likely to be split among several congressional districts). Moreover, the governments of both Bibb and Muscogee Counties specifically *requested* that they be split, so that they would each have more than one Representative to stand up for their interests in Congress.[12] If merely splitting those two counties renders GA-PLAN-A "constitutionally defective" under *Shaw* and *Miller*, then application of the *Miller* standard surely *will* "throw into doubt" dozens of the Nation's 435 congressional districts. *Miller*, 115 S. Ct. at 2497 (O'Connor, J., concurring); *see id.* (*Shaw* subjects only "extreme instances of gerrymandering" to strict scrutiny). Because none of the districts in GA-PLAN-A can trigger strict scrutiny under *Shaw I* and its progeny, as properly understood, *see, e.g., Bush*, 64 U.S.L.W. at 4454-59 (plurality opinion); *id.* at 4464 (O'Connor, J., concurring); *Shaw II*, 64 U.S.L.W. at 4439-40, that plan

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[12] Furthermore, in Bibb County, GA-PLAN-A's district lines are neither bizarre nor irregular, and its Eleventh District does not divide any census tracts. *Cf. DeWitt*, 856 F. Supp. at 1411, 1413-15. And splitting Muscogee County is necessary to keep intact the Army's Fort Benning, which lies on both sides of the Muscogee-Chattahoochee County border. By contrast, the District Court's blind allegiance to county boundaries led it to bisect Fort Benning —the State's largest military base and far and away the largest employer in the region.

would redress the constitutional infirmities in Georgia's congressional map no less than the court-imposed scheme.

B. The District Court Abused Its Discretion.

In choosing between GA-PLAN-A and its own plan, then, the court should have considered only two questions. *First*, which plan was more faithful to the legitimate districting criteria enunciated in the General Assembly's 1991 guidelines and embodied in the State's now-invalidated plan? *Second*, which plan was less disruptive to the likely outcomes of Georgia's 1996 congressional elections? On both points, GA-PLAN-A was demonstrably superior to the court-imposed scheme, and the District Court therefore abused its discretion when it selected the latter over the former.

GA-PLAN-A represented a "judicious and proper balancing" of the General Assembly's districting criteria. *DeWitt*, 856 F. Supp. at 1413. It fairly and legally reflected the voting strength of Georgia's minority citizens and of its white citizens, it preserved the cores of all eleven districts, it avoided contests between incumbents, *Miller*, 115 S. Ct. at 2483 (reciting the General Assembly's 1991 redistricting guidelines), and it could not have massively disrupted Georgia's congressional election results.

GA-PLAN-A left the homes of each of the eleven Representatives in a separate district, thus avoiding unnecessary contests between incumbents, and provided each of the incumbents at least some realistic opportunity to compete for reelection.[13] With respect to the two districts

[13] Specifically, the Eleventh District's Congresswoman, Cynthia A. McKinney, an African-American Democrat, could have run for reelection in a newly configured Eleventh District that contained the core of her old Eleventh, a 51.0% black voting-age population, and the home of no other incumbent Member of Congress. The Second District's Congressman, Sanford D. Bishop, Jr., also an African-American Democrat, could have run for reelection in a newly configured Second District that contained the core of his

declared unconstitutional, GA-PLAN-A redrew those districts such that white voters would have outnumbered black voters in both new districts.[14] But, in the newly configured districts, both incumbents (Representatives McKinney and Bishop) would have stood at least a fighting chance of reelection because they would have had the advantage of incumbency,[15] that advantage would not have been offset by having to run against another incumbent, and most of the voters in the new districts would have already been familiar with (and represented by) Representative McKinney or Bishop. And there is no doubt that the other nine incumbents, each of whom could have run in a largely familiar district, without facing another incumbent, and without having to move his home, would not have been greatly damaged or aided by GA-PLAN-A.

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old Second and a 42.0% black voting-age population, and that also contained the home of no other incumbent.

[14] GA-PLAN-A's Eleventh and Second Districts would likely have contained a significantly greater number of white voters than black voters because in Georgia, as in most of the South, whites register and turn out at a higher rate than blacks. As of 1990, blacks constituted about 25% of Georgia's voting-age population, but only 22% of its registered voters and less than 21% of its actual electorate. *See* U.S. Dep't of Commerce, Bureau of the Census, *Voting and Registration in the Election of November 1988*, Ser. P-20, no. 440 (1989); *Congressional Districts in the 1990s* 827 (1993); *Quiet Revolution in the South* 102 (Chandler Davidson & Bernard Grofman eds., 1994); *see also* 864 F. Supp. at 1392 (blacks were 60.4% of the voting-age population but only 57% of the registered voters in Georgia's Eleventh District); Mark Sherman, *State Redistricting*, Atlanta J. & Const., July 16, 1995, at 2G (blacks were 52.3% of the voting-age population but only 45% of the registered voters in the Second District).

[15] Political scientists estimate that the incumbency advantage, over the last few decades, has varied between 6 and 12 percentage points. *See, e.g.*, Gary King & Andrew Gelman, *Systemic Consequences of Incumbency Advantage in U.S. House Elections*, 35 Am. J. Pol. Sci. 110, 112-16 (1991).

By contrast, the court-imposed plan—supposedly designed to remedy a constitutional violation that does *not* focus on electoral outcomes [16]—ignored the State's legitimate political policies and needlessly risked wreaking havoc on the composition of its congressional delegation. Although Georgia had not placed two Members of Congress in the same district since 1931 (when federal census results shrank Georgia's congressional delegation from twelve members to ten and thereby forced the pairing of incumbents), the court below dismissed Georgia's policy of "avoiding contests between incumbents," *Miller*, 115 S. Ct. at 2483, as "inherently [too] political" and "not [a] predominant factor[] the state has considered in the past." 922 F. Supp. at 1564 n.10, 1565. *Compare Bush*, 64 U.S.L.W. at 4456 (plurality opinion) ("incumbency protection" and " 'avoiding contests between incumbent [Representatives]' " are legitimate redistricting goals) (quoting *Karcher v. Daggett*, 462 U.S. 725, 740 (1983), and citing *Weiser*, 412 U.S. at 797, and *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966)); *Johnson v. Miller*, No. Civ.A. CV 196-40, 1996 WL 288936, at *3 n.14, *20 (S.D. Ga. May 24, 1996) (three-judge court [17]) (In Georgia, incumbency protection is "a traditional redistricting principle" that "figure[s] greatly in the drawing of a district, whether the district is majority white or black, and likewise whether the incumbent is white or black."). The court then went on to place four incumbents in two districts, thereby unnecessarily creating two open seats.

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[16] Although plaintiff-appellee George L. DeLoach is the white Democrat who McKinney narrowly defeated in the 1992 runoff election, he brought the present action in his capacity as a voter, not as a failed candidate for Congress. Successful *Shaw* claims in Texas and Florida also were brought by unsuccessful congressional candidates. *See Vera v. Richards*, 861 F. Supp. 1304, 1340 (S.D. Tex. 1994) (three-judge court), *aff'd sub nom. Bush v. Vera*, *supra*; *Johnson v. Mortham*, 915 F. Supp. 1529, 1534 (N.D. Fla. 1995) (three-judge court).

[17] This three-judge District Court is not the same court whose decision is on appeal here.

General election contests pitting incumbent Democrats against incumbent Republicans were averted only when one of the incumbents decided to run in a district where he did not live and two other incumbents moved to new homes in newly created open districts.[18]

The District Court claimed that, by basing ten of its districts on Georgia's *1982* plan, 922 F. Supp. at 1562-65, it was being faithful to the State's announced policy of "preserving the core[s] of *existing* districts," *Miller*, 115 S. Ct. at 2483 (emphasis added). As this Court explained in *Weiser*, however, that particular policy is "aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved in the United States House of Representatives." 412 U.S. at 791. The State's policy aims could hardly be furthered by a court-imposed scheme that defers to a plan from the *1980s* and places in jeopardy the seats of nearly half the members of Georgia's *present* congressional delegation.[19]

Two of the Members of Congress placed in districts with other incumbents are Representatives McKinney and Bishop. When they first ran for Congress in 1992, neither could win the Democratic primary outright, and

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[18] Not surprisingly, all this disruption caused considerable confusion among the voters, as well as the candidates, *see* Charmagne Helton, *New Congressional Lines Spell Confusion for Voters*, Atlanta J. & Const., June 15, 1996, and may have contributed to the extraordinarily low turnout in the July 9 primaries. *See* Clarence Page, *Test Run on "Fair" Representation*, Chicago Trib., July 14, 1996, at 15.

[19] Of course, all eleven incumbents may ultimately prevail in the 1996 elections, given the advantages of incumbency and the uncertainty that this case, and this appeal, have cast over potential challengers and their supporters. But the point here is that the District Court went out of its way to draw a plan that *could potentially* wreak havoc on Georgia politics, while it expressly rejected a far less disruptive plan.

their victories in the runoff elections were narrow, as their white opponents received overwhelming support from voters in heavily white precincts. *See* U.S. Exh. 24, tables 3, 4, 10. In 1994, both were renominated in the primaries, without a runoff. In the 1994 general elections, Congresswoman McKinney and Congressman Bishop garnered 65.6% and 66.2% of the vote, respectively, even though the voting-age populations of their districts were only 60.4% and 52.3% black, respectively. Philip D. Duncan & Christine C. Lawrence, *Congressional Quarterly's Politics in America* 344, 365 (1995); *Congressional Districts in the 1990s* 203 (1993).[20] Their success was doubtless attributable both to the advantages of incumbency *and* to the lessening of racial polarization, as once-reluctant white voters saw—for the first time—that their interests could be vigorously represented in Washington by African-American Members of Congress.[21] Thus, it is clear that in 1996 Congresswoman McKinney and Congressman Bishop—with two more years of seniority and public service behind them, and with their proven willingness "to pull, haul, and trade to find common political ground," *De Grandy*, 114 S. Ct. at 2661—could potentially have been elected by the narrowly majority-*white* electorates in the reconfigured Eleventh and Second Districts of GA-PLAN-A.[22]

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[20] Similarly, Atlanta's fifth-term Congressman, John Lewis, received 69.1% of the vote in a district whose voting-age population was only 57.5% black. Duncan & Lawrence, at 351; *Congressional Districts in the 1990s* at 203.

[21] *Cf.* Tim R. Sass & Stephen L. Mehay, *The Voting Rights Act, District Elections, and the Success of Black Candidates in Municipal Elections*, 38 J.L. & Econ. 367, 389-90 (1995) (statistical analysis attributing the growing success of black candidates "to their adoption of moderate positions that attract white voters" and to slow, but significant, "changes in [white voters'] racial attitudes," as well as to the creation of new majority-minority districts).

[22] *Amicus* is not arguing here for the creation of so-called "influence districts" in which minority voters are sufficiently numerous to *influence*, but not alter, election results. *See Growe*, 507

The court-imposed plan, however, placed Congresswoman McKinney and Congressman Bishop in districts whose voting-age populations are only 32.8% and 22.5% black, respectively. Congressman Bishop subsequently moved to a new district with a 35.1% black voting-age population. No African-American has *ever* been elected in Georgia for Congressman, State Senator, or State Representative from any district with such a low black percentage.[23] *See* Joint Center for Political and Economic Studies, *National Roster of Black Elected Officials* (1995). And no African-American has *ever* been elected to Congress from such a district in *any* of the eleven former States of the Confederacy. *See American Leaders 1789-1991* (Colleen McGuiness ed., 1991); Duncan & Lawrence *passim*. Breaking these unfortunate precedents would have been particularly difficult for an African-American candidate who would have had to expend resources in the summer to avoid a runoff election for the Democratic nomination, *see* Ga. Code Ann. § 21-2-501, only to face a well-funded Republican *incumbent* Member

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U.S. at 41 n.5; *cf.* 922 F. Supp. at 1567-68. Rather, *amicus* is simply pointing out the empirical fact that, although Georgia's racial cleavages often "necessitate majority-minority districts to ensure equal political and electoral opportunity," in GA-PLAN-A's Eleventh and Second Congressional Districts—where white voters would constitute a narrow majority of the electorate—African-American citizens *might* be "able to form coalitions with [white] voters . . . to elect candidates of their choice," particularly when those candidates are incumbent Members of Congress who have consistently striven to represent *all* of their constituents regardless of race. *De Grandy*, 114 S. Ct. at 2661. As Justice Kennedy noted in *De Grandy*, "[t]he assumption that majority-minority districts elect *only* minority representatives, or that majority-white districts elect *only* white representatives, is false as an empirical matter." *Id.* at 2665 (concurring opinion) (emphases added).

[23] The District Court credited expert statistical testimony showing that a district with no incumbent will elect a black candidate if its population of registered voters is 55% black, but will elect a white candidate if that figure falls to 50% or less. *See* 922 F. Supp. at 1568; *cf.* J.S. 18-22.

of Congress in the fall campaign.[24] Although that scenario was averted when Congressman Bishop moved 80 miles from Columbus to Albany and a Republican incumbent chose to run in a district where he does not live, it could have been avoided altogether, had the District Court stayed within the scope of its remedial authority and simply adopted GA-PLAN-A.

Appellees may argue that Congresswoman McKinney and Congressman Bishop somehow "deserve" this fate because their incumbencies are "tainted" by the constitutional error that the Justice Department forced upon Georgia's General Assembly. *See* 922 F. Supp. at 1560. That argument, however, ignores the facts. At any time in the two years since the court below struck down Congresswoman McKinney's district, the Georgia General Assembly could have mooted this case by redrawing the State's congressional map, adopting any legal configuration it desired. *Cf. Louisiana v. Hays*, 64 U.S.L.W. 3848 (U.S. June 24, 1996) (summarily dismissing appeals as moot). It consistently refused to do so, even when the District Court indicated that, if the legislature failed to act, it would adopt a "narrowly conceived" plan with "minimal disruptions to the political processes of the State of Georgia." Order, Aug. 2, 1995; *accord* 864 F. Supp. at 1393. By repeatedly declining to adopt *any* substitute plan, much less one resembling the plan imposed by the court below, the State of Georgia has demonstrated its unwillingness to undermine Congresswoman McKinney, Congresman Bishop, or the constituents—black and white —who they so ably represent.

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[24] General elections, rather than partisan primary or runoff elections, typically present the greatest threat to incumbents. *See* Daniel Hays Lowenstein, *Election Law* 656, table 15.1 (1995) (from 1946 to 1994, incumbent Representatives were three-and-a-half times as likely to lose in general elections as in primaries).

Georgia's African-American Representatives have begun attaining considerable seniority in the House,[25] and their service to the State of Georgia and its citizenry has earned each of them the electoral support of a strong majority of black voters and of a significant and growing minority of white voters within their old districts. Indeed, their performance as public servants has challenged racial stereotypes held by whites and blacks alike, and has even begun to reverse the racial polarization that has marred politics in the State of Georgia for more than two centuries. Their efforts to "carry us [toward] the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire," *Shaw I*, 509 U.S. at 657—must not be jeopardized by an overzealous federal district court that got itself needlessly entangled in the "political thicket." *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (opinion of Frankfurter, J.).

IV. AFFIRMANCE OF THE DECISION BELOW WILL CONVERT *SHAW* LITIGATION INTO A POWERFUL WEAPON FOR PARTISAN AND FACTIONAL INTERESTS THAT SEEK TO WIN IN FEDERAL COURT THE POLITICAL VICTORIES THEY WERE UNABLE TO ATTAIN IN THEIR STATE LEGISLATURES OR AT THE POLLS.

Shaw litigation is now reaching a critical juncture. In addition to the two Georgia districts, six of the Nation's most bizarrely shaped and non-compact congressional districts[26] have been struck down. *See* cases cited *supra* in

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[25] In the Georgia delegation, Congressman Lewis is the second most senior member (behind Speaker Newt Gingrich), and Congresswoman McKinney and Congressman Bishop are tied for third.

[26] Using the statistical measure of compactness cited favorably in *Bush*, 64 U.S.L.W. at 4459 (plurality opinion) (citing Pildes & Niemi, *supra*, at 565, table 3 (listing districts' "perimeter scores")), six of the Nation's seven least compact majority-minority districts have already been struck down, and the ninth least compact (Illinois

note 4. Federal courts have just begun turning to the question of remediation.

If this Court affirms the decision below, unbridled discretion on the part of *Shaw* remedial courts will invite manipulation by partisan and factional interests. Because it is exceedingly difficult to attack a redistricting scheme on *non*-racial grounds, *see, e.g., Davis v. Bandemer*, 478 U.S. at 132-33, 139 (plurality opinion); *Badham v. Eu*, 694 F. Supp. 664, 667-72 (N.D. Cal. 1988) (three-judge court), *summarily aff'd*, 488 U.S. 1024 (1989), political parties, factions, and interest groups have an incentive to couch their grievances in racial terms.[27] Absent strict limits on remedial discretion in *Shaw* cases, partisan manipulators surely will seize the opportunity to gain from federal courts remedying *Shaw* violations what they were unable to gain through the State's normal political processes. The remedial phases of *Shaw* cases will quickly degenerate into political free-for-alls, and a doctrine born of the desire to constrain the Federal Government's "short-sighted and unauthorized" intrusions into state politics, *Miller*, 115 S. Ct. at 2494, will instead have opened the way to the wholesale federalization of the redistricting process.

That scenario need not come to pass. The approach to *Shaw* remedies outlined here respects the constitutionally mandated role of the States in redistricting and comports with fundamental principles of federalism and judicial restraint. And, unlike the approach taken by the court

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District 4) has been upheld by a three-judge district court. *See King v. State Bd. of Elections*, No. 95-C-827, 1996 WL 130439, at *29 (N.D. Ill. Mar. 15, 1996).

[27] *See* Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 Sup. Ct. Rev. 245, 251; *see also* Charles Fried, *The Supreme Court, 1994 Term—Foreword: Revolutions?*, 109 Harv. L. Rev. 13, 66 n.355 (1995); Richard H. Pildes, *The Politics of Race*, 108 Harv. L. Rev. 1359, 1378-90 (1995) (book review).

below, it holds forth the promise of eliminating the Nation's "most egregious racial gerrymanders," *Shaw I*, 509 U.S. at 641, *without* undermining the very persons whose efforts to build cross-racial coalitions and to "find common political ground" are helping to "hasten the waning of racism in American politics." *De Grandy*, 114 S. Ct. at 2661.

CONCLUSION

Accordingly, this Court should reverse the judgment of the District Court and remand the case with instructions to implement a remedial plan that is narrowly tailored to cure the constitutional violations found in the State's 1992 plan.

Respectfully submitted,

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